(2)

No. 91-178

In The

Supreme Court of the United States

October Term, 1991

NICHKOL MELANSON,

Petitioner,

vs.

UNITED AIR LINES, INC.,
An Illinois Corporation,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS RESTATED

1. Whether Petitioner's state tort claims for (1) negligent or intentional misrepresentation, (2) concealment and (3) promise without intent to perform, all of which relate to United Air Lines' work rules and working conditions and which would require this Court to refer to and interpret the terms of the collective bargaining agreement, are preempted by the Railway Labor Act.

2. Whether Petitioner may establish a separate employment contract which contradicts the terms negotiated by her exclusive bargaining representative.

STATEMENT REQUIRED BY RULE 29.1

Respondent United Air Lines, Inc. is wholly owned by UAL Corporation, a Delaware corporation. Respondent has no subsidiaries that are not wholly owned.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATUTES

TABLE OF AUTHORITIES – Continued

SUMMARY OF ARGUMENT

Contrary to Petitioner's claims, the petition for a writ of certiorari raises no important issues of law or conflict among the circuits. Instead, the case involves the routine application of well-settled preemption doctrine under the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.* Petitioner, unable to challenge the Ninth Circuit Court of Appeals' application of RLA authority, attempts to create an issue for certiorari by urging this Court (1) to consider whether RLA preemption should be patterned after the more restrictive preemptive effect of Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185 and (2) to resolve a purported conflict between circuit court decisions applying § 301 in the context of this RLA preemption case. Neither claim withstands scrutiny nor merits granting the writ of certiorari.

Petitioner fails to acknowledge this Court's prior analysis of the broad preemptive scope of the RLA, as well as the distinct differences in policy and statutory language between the RLA and § 301. Further, there is no *RLA* case which conflicts with the underlying Ninth Circuit decision. Petitioner's attempt to create a conflict in the circuits by relying only on § 301 cases – thereby erroneously blurring fundamental differences between the RLA and § 301 – is analytically unsound and should be rejected.

Petitioner's arguments as to the merits of her claim also fail to raise any issue worthy of this Court's attention. As the Ninth Circuit properly recognized, Petitioner's state tort claims are preempted by the RLA because the dispute involves the applicability of United's

weight program, a condition of Petitioner's employment relationship. Because Petitioner's suit could not be resolved without an examination of her employment relationship and the collective bargaining agreement ("CBA"), it raises, under long-standing principles universally recognized by this Court and the lower courts, a "minor dispute" within the meaning of the RLA. Such disputes, consistent with the fundamental purpose of the RLA, are barred from litigation in the state courts and are subject to resolution exclusively through the RLA's mandatory administrative grievance procedures.

Indeed, this Court recently denied a petition for a writ of certiorari from a Ninth Circuit decision concerning the identical issues raised by the instant case. *See Grote v. Trans World Airlines, Inc.*, 901 F.2d 1307 (9th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 386 (1990). The same result is warranted here.

COUNTERSTATEMENT OF THE CASE

A. Statement Of Facts

Petitioner is a flight attendant, currently employed by Respondent United Air Lines, Inc. ("United" or "Respondent"), who transferred from Pan American Airlines ("Pan Am") after United purchased the Pacific Division of Pan Am in 1985. As part of that acquisition, United agreed to hire 1,202 of Pan Am's flight attendants to work the newly acquired routes. On August 6, 1985, the Association of Flight Attendants ("AFA" or "Union") opened negotiations with United over the employment conditions for the Pan Am flight attendants transferring

to United. (Clerk's Record, hereinafter "CR," at 25, Ex. A, ¶ 4). On September 11, 1985, in response to a request by the AFA for information on certain employee rights, the AFA was told that if an employee came to United with a weight problem, that employee would be handled in accordance with United's policy. (CR 25, Ex. A, ¶ 4). In the following months, prospective United flight attendants, then employed by Pan Am, were provided copies of United's work rules, including the United weight program. (CR 5, Ex. 3, § III A).

As a flight attendant, Petitioner is a member of the AFA and is covered by the collective bargaining agreement to which her Union and United agreed in the month prior to Petitioner's commencing employment at United. (CR 5, ¶ 2). That agreement expressly incorporates United's weight program, as well as establishes grievance procedures which are to take effect "in the event of any alleged action or inaction by a flight attendant." (CR 5, Ex. 1, p. 146). The agreement also provides that these grievance procedures may be utilized by:

> A group of flight attendants or a flight attendant who has a grievance concerning *any action of the Company which affects her/him*. . . . (CR 5, Ex. 1, § 26C) [emphasis added].

Finally, the agreement provides for a System Board of Adjustment which is the body empowered to arbitrate disputes:

> [B]etween any employee or the Union and Company and between the Company and the Union or any employee growing out of grievances or out of interpretation or application of any of the terms of this Agreement. (CR 5, Ex. 1, § 27D).

B. Procedural History

Petitioner originally filed this action in the Superior Court of the State of California, City and County of San Francisco. Respondent removed the case to the United States District Court for the Northern District of California on the grounds of federal question and diversity jurisdiction. (CR 1).

On or about November 18, 1988, United filed a motion to dismiss Petitioner's action on the ground that her claims were preempted by the RLA. (CR 6-7). In an order dated April 12, 1989, District Court Judge Charles A. Legge granted United's motion. (CR 27). Judgment was entered on United's behalf on the same date (CR 28) and Petitioner's notice of appeal to the United States Court of Appeal for the Ninth Circuit was filed on April 27, 1989. (CR 29). On April 24, 1991, the Ninth Circuit affirmed the District Court's dismissal. (Petitioner's Appendix, hereinafter "App.," at 1-12).

The Ninth Circuit held that Petitioner's dispute arose within the employment relationship and was therefore within the preemptive force of the RLA, even though Petitioner was not working at United at the time she alleges she was told she would not be subject to United's weight program. (App. 4-5). The Ninth Circuit relied on this Court's ruling in *J.I. Case Company v. NLRB*, 321 U.S. 332, 337-39 (1944) that collective bargaining agreements ("CBA") supersede inconsistent individual employment contracts of the type that Petitioner believed to have existed. The harmful effect on the federal labor scheme of allowing such individual agreements to conflict with a CBA, the Ninth Circuit held, would be the same whether

the agreement was reached prior to or during a formal employment relationship. It is the relationship of the claim to the CBA, not the Plaintiff's employment status, that determines whether a claim will be preempted. (App. 4-5).

The Ninth Circuit then set forth the long-standing statutory framework enacted by Congress for resolving labor disputes in the railroad and airlines industries. (App. 6-7). Under that framework, "minor disputes" are relegated to exclusive and mandatory administrative grievance procedures. "Minor disputes" are defined as the "grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions." (App. 6, citing *Union Pacific Railroad Co. v. Sheehan*, 439 U.S. 89, 94 (1978)). The Ninth Circuit has also defined minor disputes as those which are "arguably" governed by a CBA, have a "not obviously insubstantial" relationship to the labor contract or "are 'inextricably intertwined with the grievance machinery of the collective bargaining agreement and of the RLA.' " (App. 6-7, citing *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367, 1369 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978); *Edelman v. Western Airlines, Inc.*, 892 F.2d 839, 843 (9th Cir. 1989) (quoting *Magnuson*, 576 F.2d at 1369)).

The Ninth Circuit found that all three of Petitioner's fraud theories were preempted because each required reference to and interpretation of the CBA. The Ninth Circuit held that to demonstrate the falsity of United's alleged representations regarding its weight program, Petitioner would have to show that the relevant provisions of the CBA differed significantly from United's

representations. This showing necessarily required reference to and interpretation of the terms of the CBA. As the Ninth Circuit stated:

> If the CBA in fact guaranteed Melanson an exemption from the weight requirements, her claim would clearly be affected, if not defeated. Her claim can scarcely be litigated without reference to the CBA. (App. 11).

Finally, the Ninth Circuit rejected Petitioner's argument that the preemption issue should be analyzed in light of this Court's decision in *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988). The Ninth Circuit held that the narrower test for § 301 preemption under *Lingle* is not necessarily determinative of preemption under the RLA because preemption under the RLA is broader than under § 301. (App. 7, citing *Grote*, 905 F.2d at 1310).

ARGUMENT FOR DENIAL OF THE WRIT

The petition is not worthy of this Court's attention. The essence of Petitioner's argument is that this Court should strike down long-standing authority establishing the differences between preemption analysis under § 301 and the RLA. Yet, Petitioner is completely unable to set forth any persuasive reason why, despite the basic differences between those statutes, the Court should constrict the RLA preemptive scope to mirror § 301 preemption. Moreover, Petitioner is unable to cite a single conflict among the circuit courts on this issue. Because this case

involves, at best, a routine application of RLA preemption of state law torts, an issue which this Court has recently elected not to review, *see Grote, supra*,[1] the petition should be denied.

A. The Supreme Court Holds That The Preemptive Scope Of The RLA Is Broader Than That Of § 301

Petitioner argues that because § 301 and RLA have some similarities, and because some circuit courts have held that *§ 301* does not preempt state tort claims similar to those presented here, this Court should hold that *neither* statute preempts such state tort causes of action. Furthermore, Petitioner argues that this Court's decision in *Lingle* should govern the RLA preemption analysis of her tort causes of action.

This tortured logic, however, overlooks the fundamental difference between the preemptive effect of the RLA and that of § 301. As this Court recently reiterated:

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[1] In *Grote*, plaintiff claimed that after he suffered chest pains, TWA requested that he perjure himself to the Federal Air Surgeon in order to get recertified to resume his flight duties. Because the CBA dealt with the company's ability to require such certificates, plaintiff's claims were at least "arguably governed" by that contractual language. *Grote*, 905 F.2d at 1309. Therefore, the Ninth Circuit held that plaintiff's claims for both tort and contractual causes of action were preempted by the RLA. The court rejected plaintiff's argument that the case should be analyzed in accordance with this Court's analysis of § 301 under *Lingle*, holding the RLA's preemptive effect was much broader than that of § 301.

"[T]he NLRA[2] 'cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly with due regard for the many differences between the statutory schemes.' " *Trans World Airlines, Inc. v. Independent Fed. of Flight Attendants*, 489 U.S. 426, 432 (1989) (quoting *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969)).

Perhaps the most pronounced difference between the two statutes is the manner in which Congress provided for dispute resolution. To promote the fundamental RLA purposes of "avoid[ing] any interruption to commerce" and "provid[ing] for the prompt and orderly settlement of all disputes growing out of . . . the interpretation or application of agreements," *see* 45 U.S.C. § 151a, the RLA requires the parties' collective bargaining agreements in the airline industry to establish adjustment boards[3] and to submit to those boards all so-called "minor disputes" that are not resolved through the statutorily required

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[2] The National Labor Relations Act of 1935, 49 Stat. 449, was amended and restated as part of the Labor Management Relations Act of 1947 ("LMRA"), 61 Stat. 136, at § 101 (1947). Section 301 of the LMRA was enacted at that same time.

[3] Section 3 of the RLA, 45 U.S.C. § 153, establishes the National Railroad Adjustment Board ("NRAB") for the determination of minor disputes in the railroad industry. Section 204, 45 U.S.C. § 184, makes Section 3 applicable to air carriers and their employees and requires the establishment of private system boards of adjustment, analogous to the NRAB, for resolution of minor disputes in the airline industry. *See, International Association of Machinists v. Central Airlines, Inc.*, 372 U.S. 682 (1963).

contractual grievance procedure. *See* 45 U.S.C. §§ 153, 184. This Court has often emphasized the importance of relegating minor disputes to the exclusive jurisdiction of the various adjustment boards. *See, e.g., Union Pacific R. Company v. Sheehan*, 439 U.S. 89, 94 (1978) (per curiam) ("Congress considered it essential to keep the so-called 'minor' disputes within the Adjustment Board and out of the courts."); *Brotherhood of Loc. Engineers v. Louisville & N. R. Company*, 373 U.S. 33, 38 (1963) ("statutory grievance procedure is a mandatory, exclusive, and comprehensive system" which cannot be circumvented "by resorting to some other forum"); *Slocum v. Delaware, L. & W.R.R.*, 339 U.S. 239, 243 (1950). Thus:

> [T]he notion that the grievance and arbitration procedures provided for minor disputes in the Railway Labor Act are optional, to be availed of as the employee or the carrier chooses, was never good history and is no longer good law.

Andrews v. Louisville & Nashville R. Co., 406 U.S. 320, 322 (1972).

The mandatory and exclusive jurisdiction granted to adjustment boards under the RLA stands in sharp contrast to the legislative scheme under the LMRA, of which § 301 is a part. Thus, in LMRA Section 203, Congress consciously rejected compulsory arbitration and instead established a policy that merely favors resort to administrative remedies. *See* 29 U.S.C. § 173(d). Indeed, § 301 itself expressly states that "Suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States" (29 U.S.C. § 185(a) (1982)). Section 301 thereby creates concurrent state and federal jurisdiction over specified labor

disputes. *Charles Dowd Box Company v. Courtney*, 368 U.S. 502, 506 (1962).

It is this difference in the preemptive scope of the two statutes which has led this Court, as well as *inter alia* the Second, Sixth and Ninth Circuits, to conclude that the RLA's preemptive force is broader than that of § 301. In *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320, 323 (1972), this Court held:

> [S]ince the compulsory character of the administrative remedy provided by the [RLA] for disputes such as that between petitioner and respondent stems not from any contractual undertaking between the parties but from the Act itself, the case for insisting on resort to those remedies is if anything stronger in cases arising under that Act than it is in cases arising under § 301 of the LMRA.

Andrews, 406 U.S. at 323; *see also Grote*, 905 F.2d at 1309-10 ("[B]ecause the RLA's preemptive force appears on the face of the statute and § 301 preemption is judicially imposed, we conclude that preemption under the RLA is broader than under § 301."); *Beard v. Carrollton Railroad*, 893 F.2d 117, 122 (6th Cir. 1989); *Baldracchi v. Pratt & Whitney Aircraft Div.*, 814 F.2d 102, 106 (2nd Cir. 1987).

Petitioner all but ignores this substantial body of case authority in the vain hope of steering this Court away from the broad preemptive effect of the RLA. Instead, Petitioner would substitute the narrower interpretation of § 301 preemption set forth by this Court in *Lingle*. Taking into account the statutory mandate of the RLA and the policy of ensuring the continued uninterrupted operation of the railroads and airlines, however, no basis or reason

exists for melding the preemption analysis of the two statutes.

1. RLA Preemption Is Broader Than § 301 Preemption Because The RLA Will Preempt Those Claims That Require Reference To The CBA, Not Merely Those Claims That Call For The CBA's Interpretation

An examination of how each statute addresses preemption readily demonstrates how the courts have maintained each statute's separate identity. Preemption analysis under § 301, as most recently defined by this Court in *Lingle*, focuses on the contractual language of the CBA. Thus, as the *Lingle* Court stated:

> An application of state law is preempted by Section 301 of the [LMRA] only if such application requires *the interpretation* of a [CBA].

Lingle, 108 S.Ct. at 1885. (Emphasis added.)

Courts analyzing preemption under the RLA, on the other hand, have consistently described the RLA's mandatory preemptive scope in much broader terms:

> *The [exclusive] jurisdiction of the adjustment board is not limited to disputes arising from provisions specifically included in a [CBA].* If the claim is founded upon *some incident of the employment relationship, or an asserted one,* the board may determine the meaning and effect of the provisions of the [CBA] with reference either to an included or to an omitted case.

Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 723 (1945); *Railroad Labor Executives Ass'n v. Atchison, Topeka & Santa*

Fe Railway Co., 430 F.2d 994, 997 (9th Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971); *Gen. Com. of Adj., United Transp. Union v. CSX Railroad Co.*, 893 F.2d 584, 592 (3rd Cir. 1990) ("either express or implied contractual terms, as interpreted through established past practice, will serve to classify a dispute as minor"); *Edelman v. Western Airlines, Inc.*, 892 F.2d 839, 845 (9th Cir. 1989) (plaintiff cannot avoid preemption by omitting any reference to the CBA in complaint); *Leu v. Norfolk & Western Ry. Co.*, 820 F.2d 825, 829 (7th Cir. 1987) (if the alleged responsibility of the carrier arises from a "course and practice" of the carrier rather than from a provision of a CBA, the question of whether that responsibility exists at all requires an interpretation of the CBA).

Thus, the decision below is in complete harmony with the holdings of this Court and those of other federal courts, which have universally recognized that "[employees] cannot escape the exclusive governance of the RLA by articulating their claim in terms of a state tort action." *Leu*, 820 F.2d at 830; *see also, Stephens v. Norfolk & Western Ry.*, 792 F.2d 575, 580-81 (6th Cir. 1986). The courts have, therefore, repeatedly and consistently held (as did the Ninth Circuit in the instant case) that they lack subject matter jurisdiction over such claims regardless of whether such claims are phrased as wrongful termination,[4] "harass[ment]" or "outrageous

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[4] *See, e.g., Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320, 323-24 (1972); *Hill v. Norfolk & W. Ry. Co.*, 814 F.2d 1192 (7th Cir. 1987); *Woolridge v. National Railroad Passenger Corp.*, 800 F.2d 647, 649 (7th Cir. 1986); *Essary v. Chicago & N.W. Transp. Co.*, 618 F.2d 13, 17 (7th Cir. 1980); *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367, 1369 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978); *Spencer v. Missouri Pac. R. Co.* 581 F.Supp. 1220, 1221 (E.D. Mo.), *aff'd*, 743 F.2d 627 (8th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985).

conduct,"[5] wrongful or malicious withholding of benefits,[6] infliction of "severe anguish" or "mental suffering,"[7] "fabricating documents concerning [the employee's] case,"[8] "constitutional" violations,[9] defamation,[10] false imprisonment,[11] fraud,[12] interference

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[5] *See, e.g., Beers v. Southern Pac. Transp. Co.*, 703 F.2d 425, 427, 429 (9th Cir. 1983).

[6] *See, e.g., De La Rosa Sanchez v. Eastern Airlines, Inc.*, 574 F.2d 29, 32 (1st Cir. 1978).

[7] *See, e.g., Beers*, 703 F.2d at 429; *Choate v. Louisville & N. R.R.*, 715 F.2d 369, 371 (7th Cir. 1983); *Magnuson*, 576 F.2d at 1369; *Salcedo v. Norfolk and Western Ry. Co.*, 572 F.Supp. 286, 288 (E.D. Mich. 1982), *aff'd mem.*, 723 F.2d 911 (6th Cir. 1983).

[8] *See, e.g., Hill v. Norfolk & W. Ry.*, 814 F.2d 1192 (7th Cir. 1987); *Woolridge v. National Railroad Passenger Corp.*, 800 F.2d 647, 648-49; *Magnuson*, 576 F.2d at 1369-70.

[9] *See, e.g., Woodrum v. Southern Ry. Co.*, 571 F.Supp. 352, 359 (M.D. Ga. 1983), *aff'd* 750 F.2d 876 (11th Cir.) *cert. denied*, 474 U.S. 821 (1985); *Bernhardt v. American Airlines, Inc.*, 511 F.2d 1219 (9th Cir. 1975) (per curiam).

[10] *See, e.g., Majors v. U.S. Air, Inc.*, 525 F.Supp. 853 (D. Md. 1981); *Carlson v. Southern Ry. Co.*, 494 F.Supp. 1104 (D.S.C. 1979); *Fraley v. Hayes*, 112 L.R.R.M. (BNA) 2298 (S.D. Ill. 1982); *Louisville & N. R v. Marshall*, 586 S.W.2d 274 (Ky. Ct. App. 1979).

[11] *See, Majors v. U.S. Air, Inc.*, 525 F.Supp. 853 (D. Md. 1981).

[12] *See, e.g., Leu v. Norfolk & Western Ry. Co.*, 820 F.2d 825 (7th Cir. 1987); *Woodrum v. Southern Ry. Co.*, 571 F.Supp. 352 (M.D. Ga. 1983); *aff'd*, 750 F.2d 876 (11th Cir.), *cert. denied*, 474 U.S. 821 (1985).

with contractual relations,[13] negligent misrepresentation,[14] unlawful business practices,[15] "deliberate breach of an obligation designed to cause damage to another,"[16] conspiracy,[17] wrongful refusal to recall from furlough,[18] conversion,[19] or breach of the implied covenant of good faith and fair dealing.[20]

2. The Ninth Circuit Properly Applied The RLA's Broad Preemptive Effect In The Instant Case

Given the broad standard for determining the scope of RLA preemption set forth by this Court and the circuit courts, it is clear that the Ninth Circuit properly applied that standard in the instant case. The Ninth Circuit found that to prevail on her misrepresentation theories,

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[13] *See, Salcedo v. Norfolk & Western Ry.*, 572 F.Supp. 286 (E.D. Mich. 1982), *aff'd mem.*, 723 F.2d 911 (6th Cir. 1983).

[14] *See, Schwadron v. Trans World Airlines, Inc.*, 585 F.Supp. 1371 (W.D. Pa. 1984).

[15] *See, Schroeder v. Trans World Airlines*, 702 F.2d 189 (9th Cir. 1983).

[16] *See, De La Rosa Sanchez v. Eastern Airlines, Inc.*, 574 F.2d 29 (1st Cir. 1978).

[17] *See, e.g., Bernhardt v. American Airlines, Inc.*, 511 F.2d 1219 (9th Cir. 1975); *Spencer v. Missouri Pac. R. Co.*, 581 F.Supp. 1220 (E.D. Mo.) *aff'd*, 743 F.2d 627 (8th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985).

[18] *See, Boggs v. Consolidated Rail Corp.*, 112 L.R.R.M. (BNA) 2295 (D.C. Pa. 1982).

[19] *See, Leu v. Norfolk & W. Ry.*, 820 F.Supp. 825 (7th Cir. 1987).

[20] *See, Woolridge v. National Railroad Passenger Corp.*, 800 F.2d 647 (7th Cir. 1986).

Petitioner would have to show that United made a false representation of material fact regarding its weight program, which showing in turn would require that the relevant provisions of the CBA differ significantly from those representations. Petitioner's claims, therefore, necessarily require reference to and interpretation of the terms of the collective bargaining agreement; only by examining the provisions of the weight program could the trier of fact determine if the alleged misrepresentations were, in fact, false.

Petitioner's only rejoinder is to fall back on her question-begging *ipse dixit* that the stricter standards of § 301 preemption should govern and that, under *Lingle*, her claims do not require "interpretation" of the CBA.[21] As this case concerns the broader RLA preemptive force,

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[21] Petitioner's claim also suffers from an overly restrictive definition of the term "interpretation." Again mistakenly relying on *Lingle*, Petitioner asks this Court to adopt a definition of "interpretation" that is tantamount to requiring an analysis or study of contractual terms to ascertain their meaning or effect. This is too strict a definition because it does not take into account the broader RLA preemption that merely asks whether a claim requires reference to the CBA. For example, in *Grote*, the plaintiff claimed that the airline required him to perjure himself to the Federal Air Surgeon in order to obtain medical certification. A paragraph of the CBA dealt with the airline's ability to require any of its pilots to obtain a current medical certificate. Thus, the court held that the subject of Grote's claim was arguably governed by that paragraph of the agreement and found that the claim was preempted by the RLA. *Grote*, 905 F.2d at 1309. Similarly, here, the provisions of the weight program arguably govern Petitioner's claims and inescapably lead to preemption.

Petitioner's arguments are without merit and do not warrant review by this Court.[22]

B. Petitioner's Argument That Her Claims Should Not Be Preempted Because She Is Asserting Statutory Rights Does Not Raise An Important Issue Of Law

Petitioner relies on *Lingle* for the proposition that employees' claims based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers are not preempted by § 301. *Lingle*, 486 U.S. at 406. Petitioner asserts that her claims arise out of statutes designed to provide minimum substantive guarantees to all citizens (Cal. Civ. Code §§ 1709, 1710) and therefore should not be preempted by the RLA.

Aside from the fact that this case concerns the RLA and not § 301, Petitioner's argument again misperceives the focus of RLA preemption analysis. This Court and all circuit courts applying the RLA unanimously hold that a court faced with a preemption issue must examine the extent to which a cause of action is founded on the employment relationship or requires reference to the CBA, not whether that cause of action is based on a

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[22] Implicit in Petitioner's argument is the assumption that the Ninth Circuit's decision in this case would have been different if the court had analyzed the issues under *Lingle*. As the Ninth Circuit properly held, however, Petitioner's claims would not only require reference to the CBA, but would actually require its interpretation. (App. 9-11). Moreover, the Court stated that its analysis would not change if the more restrictive § 301 standard was applied. (App. 7-8 at fn. 3.) Thus, Petitioner's claims are preempted regardless of the statute under which they are analyzed.

statute. *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 723 (1945); *Railroad Labor Executives Ass'n v. Atchison, Topeka & Santa Fe Railway Co.*, 430 F.2d 994, 997 (9th Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971); *Gen. Com. of Adj., United Transp. Union v. CSX Railroad Co.*, 893 F.2d 584 (3rd Cir. 1990); *Edelman v. Western Airlines, Inc.*, 892 F.2d 839, 843 (9th Cir. 1989); *Leu v. Norfolk & Western Ry. Co.*, 820 F.2d 825, 828, fn. 7 (7th Cir. 1987). Thus, Petitioner's "statutory" argument merely rehashes her argument that the RLA and § 301 should be analyzed similarly. Neither argument is worthy of this Court's review.[23]

C. Petitioner Cannot Construct Any Conflict In The Circuit Courts Of Appeal With Regard To RLA Preemption Of State Law Tort Claims

In arguing that a conflict exists among the circuit courts of appeal, Petitioner repeats her earlier mistake by claiming that the Ninth Circuit's RLA preemption analysis conflicts with those courts that, she believes, analyze

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[23] Moreover, on a common sense level, virtually every statute or local ordinance is designed to provide some "minimum substantive guarantees to citizens." Further, most disputes can be recharacterized as involving some state statutory claim, even though the crux of the conduct involves the working conditions governed by federal law. Permitting employees to circumvent the preemptive force of the RLA any time a state statutory right existed would make a mockery of the RLA's regulatory scheme. The logical conclusion of Petitioner's argument would result in the destruction of the exclusive alternative dispute resolution procedures required by the RLA and cause the loss of the stability that the RLA was enacted to provide. *Cf., Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985).

the RLA and § 301 interchangeably. While there are certainly cases in which courts have analogized between the two statutes, Petitioner's argument fails because, as set forth above, the RLA is not interchangeable with § 301, but rather is far broader in preemptive effect. In fact, the manner in which the circuit courts of appeal have handled preemption of state tort claims under the RLA is perfectly consistent and requires no clarification by this Court.

For example, *Beard v. Carrollton Railroad*, 893 F.2d 117 (6th Cir. 1989), held that a state law tort claim was preempted by the RLA because state law made breach of contract an essential element of the tort and, therefore, required interpretation of the CBA. *Beard*, 893 F.2d at 122. In so holding, the court recognized that the *Lingle* approach was instructive and consistent with preemption analysis under the RLA. The court, however, also recognized that the RLA was broader and that "it is probably more likely that a state law claim will interfere with federal interests in the context of [the RLA]." *Beard*, 893 F.2d at 122. Thus, rather than supporting Petitioner's assertion that § 301 and the RLA are interchangeable, *Beard* makes it clear that there are significant differences between the two statutes.

Likewise, the Ninth Circuit's holding in the instant case is perfectly consistent with *Beard*. In both cases, the courts properly held that the inquiry should focus on whether the asserted causes of action require the court to refer to the CBA. As both the *Beard* causes of action and

Melanson's fraud claims required reference to the CBA, preemption was appropriate.[24]

Petitioner cites *Baldracchi v. Pratt & Whitney Aircraft Division*, 814 F.2d 102 (2nd Cir. 1987), a case analyzing preemption under § 301, apparently because that decision relies in part on this Court's ruling in *Pan American World Airways v. Puchert*, 472 U.S. 1001 (1985). In *Puchert*, this Court dismissed the appeal from the Hawaiian Supreme Court, without discussion, for want of a federal question. The Hawaiian Supreme Court had held that the RLA did not preempt a state cause of action for discharge in retaliation for filing a workers' compensation claim. The *Baldracchi* court reasoned that if the broader preemption scheme of the RLA did not cover that claim, that a similar claim would therefore not be preempted by § 301.

Baldracchi is in complete accord with the Ninth Circuit's decision in this case. In *Baldracchi*, the Connecticut statute stated that a charge thereunder was not to be decided by reference to a labor contract. Accordingly,

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[24] Petitioner also mistakenly relies on the absence of a decision by this Court expressly holding a state tort (as opposed to contract) claim preempted by the RLA. Petition ("Pet.") at 9-10. *See, Andrews*, 406 U.S. at 324 ("wrongful discharge" claim preempted). Petitioner also asserts that there is a difference in how courts analyze preemption of tort and contract clauses of action. Pet. 10. Petitioner is again incorrect. The issue is not tort versus contract, but rather whether the cause of action requires reference to the CBA and the employment relationship. *Magnuson*, 576 F.2d at 1369.

unlike the instant case, there was no need to refer to or interpret the contract.[25]

Finally, Petitioner misplaces reliance on two cases which hold that the RLA does not preempt federal statutory causes of action where the claims have legally independent origins, separate and apart from the CBA. In both *Coppinger v. Metro-North Commuter R.R.*, 861 F.2d 33, 36 (2nd Cir. 1988) and *McAlester v. United Airlines, Inc.*, 851 F.2d 1249, 1252-1255 (10th Cir. 1988), independent *federal* statutory schemes for redressing constitutional wrongs to aggrieved individuals were at stake; nothing in either statutory plan suggested that a prior determination in an arbitration proceeding prevented a plaintiff from bringing suit in federal court or divested that court of jurisdiction. *Coppinger*, 861 F.2d at 37; *McAlester*, 851 F.2d at 1255-56. Most important, however, in neither case was the court required to refer to the language of the CBA in resolving the issue. *Coppinger*, 861 F.2d at 36; *McAlester*, 851 F.2d at 1253. Accordingly, there is no inconsistency between these two opinions and the Ninth Circuit's decision in the instant case. On the contrary, *Coppinger* and *McAlester* merely follow this Court's holding in *Atchison, Topeka and Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987),

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[25] Nor does the *Puchert* decision conflict with traditional RLA preemption analysis. The Hawaiian Supreme Court held that the resolution of the dispute in question did not hinge on the application or interpretation of the CBA, but rather was solely dependent on the statutory language. *Puchert v. Agsalud*, 67 Haw. 25, 30, 677 P.2d 449, 454 (1984). Other cases holding that state law claims were preempted by the RLA were deemed distinguishable by the Hawaiian Supreme Court on the grounds that the claims in those cases were identical to the contractual claims provided for in the CBA. *Id.*

that Congress has the power to limit the ambit of its own laws. *See also Grote*, 905 F.2d at 1310.[26]

The cases cited by Petitioner do not establish the existence of a conflict among the circuit courts as to the analysis of RLA preemption of state law tort claims. As there is no conflict, the instant petition should be denied.

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[26] Petitioner also relies on *Merchant v. American S.S. Company*, 860 F.2d 204 (6th Cir. 1988), a § 301 case, as an example of the Sixth Circuit's criticism of RLA preemption of state law claims under *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984). As *Merchant* is a case decided under § 301, and as its comments regarding the RLA are merely dicta, *Merchant* does not even begin to suggest a conflict in the way in which circuit courts interpret the RLA after *Lingle*. If such a conflict existed, the Ninth Circuit's decision in *Grote, supra*, would have provided an opportunity for this Court to review that conflict. Just as this Court elected not to accept certiorari on *Grote*, so too should it deny Petitioner's request here.

Moreover, *Merchant* is hardly persuasive authority given the fact that the Honorable David A. Nelson, Circuit Judge and author of that opinion, also wrote the majority opinion in *Beard, supra*, a Sixth Circuit case decided a year after *Merchant*. In *Beard*, Judge Nelson expressly relied on *Jackson* in determining that state law tort claims required interpretation of the CBA and were, therefore, preempted by the RLA. *Beard*, 893 F.2d at 122.

D. Petitioner Is Unable To Articulate Any Reason Why The Ninth Circuit Was Incorrect In Determining That Pre-Employment Representations Were Preempted By The RLA

Petitioner argues that the Ninth Circuit was incorrect in determining that the timing of the alleged misrepresentations was not fatal to RLA preemption. The Ninth Circuit relied on this Court's rulings in *J. I. Case Company v. NLRB*, 321 U.S. 332, 337-39 (1944) and *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 346-47 (1944) to find that the collective bargaining agreement supersedes inconsistent individual employment contracts. According to the Ninth Circuit:

> The effect on the federal labor scheme of allowing individual agreements that conflict with the CBA would be the same whether the agreement is reached prior to or during a formal employment relationship. The timing of the agreement or alleged tortious act, then, is not necessarily determinative. *It is the relationship of the claim to the CBA, regardless of the plaintiff's employment status, that guides the preemption analysis.*

App. 4-5. (Emphasis added.)

Petitioner's only response to this forceful argument is that she is not attempting to enforce a separate agreement. Nevertheless, Petitioner cannot deny that if United indeed made misrepresentations, those misrepresentations would form the terms of a separate agreement different from those of the collective bargaining agreement. Under these circumstances, the threat to the federal labor scheme is clear and cannot be permitted, regardless of Petitioner's employment status at the time of the alleged

misrepresentations. As the claim relates to the CBA, Petitioner's employment status is wholly irrelevant.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 22, 1991

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